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MOHD KHIR REJAB

v.

TIMBALAN MENTERI DALAM NEGERI & ORS

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HIGH COURT MALAYA, MUAR
UMI KALTHUM MAJID JC
[CIVIL SUIT NO: 22-18-2009]
26 MARCH 2010

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ADMINISTRATIVE LAW: *Exercise of administrative powers - Dismissal - Dismissal of a police sergeant - Disciplinary proceedings - Disciplinary proceedings under Public Officers (Conduct and Discipline) Regulations 1993 - Whether flawed - Whether should have been conducted under Police (Conduct and Discipline) (Junior Police Officers And Constables) Regulations 1970 - Reference to reg. 33 of 1993 Regulations in dismissal letter - Whether letter rendered null and void - Whether an error - Intended regulation was reg. 36(1)(b) of 1993 Regulations - Effect thereof - Whether plaintiff prejudiced by mistake*

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The plaintiff, a police sergeant, had been detained under a restriction order issued under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, and arising therefrom had been dismissed from the police force. In this application to declare null and void his said detention and dismissal, the plaintiff *inter alia* argued that the disciplinary proceedings against him which was held under the provisions of the Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulations') was flawed, as rightfully and properly, the proceedings should have been held pursuant to the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('1970 Regulations'). Additionally, it was argued that the reference to reg. 33 of the 1993 Regulations in the dismissal letter issued by the second defendant Deputy Chief Police Officer, Kedah had rendered the letter null and void, as the Deputy Chief Police Officer had clearly taken into account matters which should not have been taken into account. This issue aside, a further issue however also arose as to whether the reference to reg. 33 herein was an error, and that what was intended to be referred to by the dismissing authority was reg. 36(1)(b) of the 1993 Regulations, and consequently whether the same had prejudiced the plaintiff.

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Held (dismissing the plaintiff's claim with costs):

(1) The list of disciplinary offences in the Schedule to the 1970 Regulations, certainly would not cover the disciplinary offence envisaged under reg. 36(1)(b) of the 1993 Regulations.

However, s. 18 of the Police Act 1967 fills the gap between what had been provided under the Police Act, the Rules and Police Regulations and what had not been provided thereunder but provided under the "provisions as are applicable to other public officers" *vis* the 1993 Regulations. Therefore, the 1993 Regulations did apply to the plaintiff at the material time. *Nordin Hj Zakaria (Timbalan Ketua Polis, Kelantan) & Anor v. Mohd Noor Abdullah* (dist) (para 10)

(2) Having perused the dismissal letter as well as the suspension letter, the reference to reg. 33 in the dismissal letter was clearly an error. What the 2nd defendant meant was reg. 36(1)(b) of the 1993 Regulations and not reg. 33. Thus, the plaintiff's submission that the reference to reg. 33 of the 1993 Regulations in the dismissal letter would render the said letter null and void also falls. (para 13)

(3) Since there was a mistake made in the dismissal letter, when the 2nd defendant referred to reg. 33 where he had actually meant reg. 36(1)(b), it followed that the 2nd defendant did not mislead himself by taking into account matters which were not within the purview of reg. 36(1)(b). The plaintiff did not suffer any injustice over this mistake. The court disagreed with the plaintiff's counsel's submission that by referring to reg. 33 it showed that the 2nd defendant did not apply his mind to the correct regulation. Accordingly, the plaintiff's claim is dismissed with costs. (paras 14 & 15)

Case(s) referred to:

Abdul Wahab Abdullah lwn. Ketua Polis Negara & Satu Lagi [2000] 3 CLJ 250 HC ***(refd)***

Nordin Hj Zakaria (Timbalan Ketua Polis, Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(dist)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4A(1)
Evidence Act 1950, s. 114(g)
Police Act 1967, ss. 2(1), 18
Police (Conduct and Discipline) (Junior Police Officers And Constables) Regulations 1970, reg. 1(2)(a)
Public Officers (Conduct and Discipline) Regulations 1993, regs. 33, 36(1)(b), (2), 46(1)(b)

For the plaintiff - SB Cham; M/s Markhan Singh & Assocs
For the defendant - Juraidah Abbas SFC

Reported by Susheila Sreedharan

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JUDGMENT

Umi Kalthum Majid JC:

The Suit

B **[1]** The plaintiff filed this action against the three defendants claiming for the following reliefs:

(a) a declaration that the restriction order dated 12 April 1997 ("restriction order") imposed on him under s. 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance
C 1969 "the Emergency Ordinance") was invalid, null and void;

(b) a declaration that his dismissal from the Royal Malaysia Police Force ("RMPF") on 12 April 1997 was null and void and of no effect and that he is still a Sergeant in the RMPF;

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(c) damages for the wrongful imposition of the detention order;

(d) an enquiry be conducted for the determination of his salary, emoluments and other benefits;

E (e) damages for unlawful dismissal;

(f) exemplary damages and aggravated damages;

(g) costs;

F (h) interest; and

(i) other reliefs as the court thinks fit.

Preliminaries

G **[2]** The parties had filed their agreed bundle of documents ("agreed bundle, encl. 27) and their pleadings (encl. 40). Before the trial started, I had drawn the attention of learned counsel for the plaintiff on the inappropriateness of the plaintiff to base his action by challenging the restriction order, as this court does not have the necessary jurisdiction to consider the challenge made. I had directed
H parties to instead base their respective case on the points of law pertaining to the plaintiff's dismissal. The parties then filed their respective written submissions and replies.

Brief Facts

I **[3]** The plaintiff was at the material time a sergeant in the RMPF. He was suspended from his duties pursuant to reg. 46(1)(b), read together with reg. 36(1)(b) of the Public Officers (Conduct

and Discipline) Regulations 1993 [PU(A) 395/1993] ("1993 Regulations") with effect from 12 April 1997 on the ground that he had been detained under a restriction order made under s. 4A(1) of the Emergency Ordinance. The suspension letter was dated 17 April 1997 and signed by 2nd defendant ("suspension letter") (p. 3, agreed bundle).

[4] The plaintiff served his period of restriction without ever applying for a writ of *habeas corpus*. His period of restriction was for two years beginning from 12 April 1997 (pp. 5-9, agreed bundle).

[5] By a letter dated 17 April 1997 from the 2nd defendant ("dismissal letter") (p. 10, agreed bundle), the plaintiff was dismissed from service with effect from 12 April 1997.

Issues

[6] The issues posed by the parties are as follows:

(a) whether the disciplinary proceedings against the plaintiff should have been conducted under the Police (Conduct and Discipline) (Junior Police Officer And Constables) Regulations 1970 [PU(A) 86/1970] ("1970 Regulations");

(b) whether the reference to reg. 33 of the 1993 Regulations in the dismissal letter would render the said letter null and void;

(c) whether, by referring to reg. 33 of the 1993 Regulations in the dismissal letter, the 2nd defendant had taken into account matters which should not have been taken into account by him before deciding to dismiss the plaintiff.

Whether The 1970 Regulation Applied To The Plaintiff

[7] It was submitted by learned counsel for the plaintiff that the 1970 Regulations should have been applied by the 2nd defendant when the latter had taken disciplinary action against the plaintiff. Instead the 2nd defendant had invoked the provisions of the 1993 Regulations. Consequently the decision of the 2nd defendant to dismiss the plaintiff by using the wrong law had made the decision invalid and unenforceable and should be set aside by the court.

[8] In making this submission, learned counsel made references to:

(a) the fact that the plaintiff before he was dismissed was a Sergeant; by virtue of which he came under the definition of "junior police officer" in s. 2(1) of the Police Act 1967 (Act 344) ("Police Act"), which defines "junior police officer" as:

A "... means a police officer of any rank from and including a Sub-Inspector down to and including a Corporal;";

(b) the 1970 Regulations apply to, amongst others, "all junior police officers and constables recruited in the States of Malaya" (reg. 1(2)(a)), which meant that the plaintiff fell within the B meaning of "junior police officer" for the purposes of the 1970 Regulations;

(c) even though the 1970 Regulations had been repealed *vide* the Police (Conduct And Discipline) (Junior Police Officers And C Constables) (Repeal) Regulations 2000 [PU(A)451/2000], which came into force on 1 January 2001, however, on the date the plaintiff was dismissed, that is, 12 April 1997 through the 2nd defendant's letter dated 17 April 1997, the applicable law was still the 1970 Regulations;

D (d) on the authority of *Nordin Hj Zakaria (Timbalan Ketua Polis, Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777, FC, it was ruled that as the 1970 Regulations had been expressly made to govern the discipline of junior police officers (that is the rank of Sub-Inspector down to Corporal and includes E Constable), the 1993 Regulations can only apply to all other senior police officers.

[9] Learned Senior Federal Counsel for all the three defendants submitted that:

F (a) whilst conceding that the 1970 Regulations govern the discipline of junior police officers and constables in Malaysia, the 1970 Regulations had been repealed as of 1 January 2001. Therefore after 1 January 2001 their disciplinary actions come under the 1993 Regulations;

G (b) the 1970 Regulations listed 66 disciplinary offences specified in the Schedule. Any disciplinary offences which had not been specified in the Schedule could be dealt with under the applicable provisions of the 1993 Regulations. This was because H s. 18 of the Police Act provided as follows:

> 18. Save as otherwise provided in this Act and in the Rules and Police Regulations made thereunder, every police officer shall unless expressly excluded be subject to the same provisions as are applicable to other public officers of corresponding status in the I service of the Government of Malaysia.

(c) should a junior police officer be subjected to an order of detention, supervision, restricted residence, banishment or deportation, which are not included in the Schedule to the 1970 Regulations, then the 1993 Regulations apply;

(d) the case of *Abdul Wahab Abdullah lwn. Ketua Polis Negara & Satu Lagi* [2000] 3 CLJ 250 is the authority cited for this proposition where the General Orders 1980 (the precursor to the 1993 Regulations) were invoked in relation to a restriction order on a police constable in 1992;

(e) the case of *Nordin bin Haji Zakaria (supra)* must be distinguished from the present case as that case related to disciplinary offences for misconduct which were within the scope of the 1970 Regulations.

[10] At first blush, I would be inclined to agree with the learned counsel for the plaintiff's submission, that as the repeal of the 1970 Regulations took effect only on 1 January 2001, and since the plaintiff was dismissed on 12 April 1997, logically it followed that the 1970 Regulations would apply to the plaintiff and not the 1993 Regulations. However, looking at the list of disciplinary offences in the Schedule to the 1970 Regulations, it certainly would not cover the disciplinary offence envisaged under reg. 36(1)(b) of the 1993 Regulations. Which is why we have the provisions of s. 18 of the Police Act to fill the gap between what had been provided under the Police Act, the Rules and Police Regulations and what had not been provided thereunder but provided under the "provisions as are applicable to other public officers "*vis* the 1993 Regulations. I therefore agree with the submissions of learned Senior Federal Counsel and I rule that the 1993 Regulations did apply to the plaintiff at the material time. In doing so I agree that the facts of *Nordin Haji Zakaria*'s case are distinguished from the facts of this case.

Whether The Reference To Regulation 33 Of The 1993 Regulations In The Dismissal Letter Would Render The Said Letter Null And Void

[11] In order to put this issue in perspective, I quote the whole body of the dismissal letter as follows:

> Adalah saya, Senior Asisten Komisioner Polis II Mohd Radzali bin Shah Lason, Timbalan Ketua Polis Kedah memaklumkan bahawa pada menjalankan kuasa-kuasa tatatertib yang telah diwakilkan kepada saya oleh Suruhanjya Pasukan Polis melalui P.U.(B) 621 bertarikh 19/12/85 dan memandangkan pada 12/4/1997 anda telah dikenakan Perintah

A Sekatan mengikut Seksyen 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah), 1969 oleh Timbalan Menteri Dalam Negeri Malaysia melalui Perintah Sekatan (Rujukan KDN.S.POPOC.12502) bertarikh 12/4/1997, iaitu tarikh berkuatkuasa Perintah Sekatan dikenakan terhadap anda.

B 2. Setelah mengkaji keputusan Perintah Sekatan tersebut **dan lain-lain keterangan** saya memutuskan anda dibuang kerja di bawah Peraturan 38(g) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, mengikut **Peraturan 33 dan 37 Peraturan-Peraturan tersebut itu** berkuatkuasa mulai 12/4/1997 iaitu tarikh anda dikenakan Perintah Sekatan oleh Timbalan Menteri Dalam Negeri dan tarikh anda
C digantung kerja.

[Emphasis added.]

[12] It was argued for the plaintiff that he was never convicted of any offence and therefore the reference to reg. 33 in the dismissal
D letter was clearly wrong. Not only that, the defendants had failed to prove all that were needed to be proven under reg. 33 (that is reg. 33 before it was substituted by a new reg. 33 *vide* PU(A) 246/2002). For example, the letter of application to the court for a copy of the court's decision convicting the plaintiff and the court's
E decision itself should have been tendered into court. Failure to do so on the part of the defendants, it was argued would enable this court to invoke the application of s. 114(g) of the Evidence Act 1950 ("Evidence Act") against the defendants.

[13] Having perused the dismissal letter as well as the suspension
F letter, I find that the reference to reg. 33 in the dismissal letter was clearly an error, since:

(a) the first paragraph of the dismissal letter clearly made reference to the restriction order issued under s. 4A(1) of the Emergency
G Ordinance;

(b) the first paragraph of the suspension letter, of even date with the dismissal letter, similarly made the same reference to the restriction order and the provisions of the Emergency Ordinance. It also went further to refer to reg. 46(1)(b) (the
H provision to suspend the plaintiff from work) and "selaras Peraturan 36(1)(b) Peraturan yang sama", that is, the regulation pertaining to "an order which imposes on the officer any form of restriction or supervision, whether with bond or otherwise, has been made against an officer". (I note that
I references to the regulations in the 1993 Regulations were before the 1993 Regulations were amended *vide* PU(A) 246/ 2002.).

I am therefore, of the view that what the 2nd defendant meant was reg. 36(1)(b) of the 1993 Regulations and not reg. 33. With that finding, the plaintiff's submission on this aspect also falls.

Whether, By Referring To Reg. 33 Of The 1993 Regulations In The Dismissal Letter, The 2nd Defendant Had Taking Into Account Matters Which Should Not Have Been Taken Into Account By Him Before Deciding To Dismiss The Plaintiff

[14] This issue is connected to the last issue discussed above. Since I have found that there was a mistake made in the dismissal letter, when the 2nd defendant referred to reg. 33 where he had actually meant reg. 36(1)(b), it followed that the 2nd defendant did not mislead himself by taking into account matters which were not within the purview of reg. 36(1)(b). I agree with the submission of learned a Senior Federal Counsel that the plaintiff did not suffer any injustice over this mistake. The second paragraph of the dismissal letter clearly stated that the 2nd defendant had studied the restriction order "dan lain-lain keterangan" before he made the decision to dismiss the plaintiff. It is obvious to me that the "lain-lain keterangan" referred to by the 2nd defendant would relate to the restriction order, the report of the Head of Department together with the record of service of the plaintiff plus any recommendation the Head of Department would like to make to the "Disciplinary Authority", in this case the 2nd defendant. This is provided for in reg. 36(1) and (2) of the 1993 Regulations. I therefore disagree with the learned counsel for the plaintiff's submission that by referring to reg. 33 it showed that the 2nd defendant did not apply his mind to the correct regulation and, since there was a doubt raised on the state of mind of the 2nd defendant before he decided to dismiss the plaintiff, the plaintiff should be given the benefit of that doubt.

Conclusion

[15] Based on my findings above, I find that the plaintiff has failed to make out his case against all the defendants. I therefore dismiss his claim with costs at RM8,000.